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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Arch

October 22, 1999

Via Hand Delivery

Ms. Magalie Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Petitions for Reconsideration of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185; Arch v. U S WEST, Inc., E-99-05; Arch v. BellSouth Telecommunications, Inc., E-99-06; Metrocall, Inc. v. BellSouth Telecommunications, BellSouth Corporation, GTE Telephone Operations, Pacific Bell Telephone Company, U S WEST Communications, Inc., E-98-14, E-98-16, E-98-17, E-98-18; TSR Paging, Inc. v. U S WEST, E-98-13; MAP Mobile Communications, Inc. v. U S WEST, E-9-11
Ex Parte Submission

Dear Ms. Salas:

Arch Communications Group, Inc. hereby submits the attached letter as a written Ex Parte in the above-captioned proceedings. An original and four copies of this letter are being submitted to you in compliance with 47 C.F.R. § 1.1206(b)(2) to be included in the record of the proceedings referenced above.

If you have any questions concerning this matter, please contact me at 508-870-6089.

Sincerely,

Patricia A. Gray
Vice President and General Counsel

Attachment
cc: John E. Ingle
Frank Lamancusa
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October 22, 1999

Via Hand Delivery

Christopher J. Wright, Esquire
General Counsel
Federal Communications Commission
445 Twelfth Street, S.W., Room 8C-723
Washington, D.C. 20554

Re: Petitions for Reconsideration of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185; Arch v. U S WEST, Inc., E-99-05; Arch v. BellSouth Telecommunications, Inc., E-99-06; Metrocall, Inc. v. BellSouth Telecommunications, BellSouth Corporation, GTE Telephone Operations, Pacific Bell Telephone Company, U S WEST Communications, Inc., E-98-14, E-98-16, E-98-17, E-98-18; TSR Paging, Inc. v. U S WEST, E-98-13; MAP Mobile Communications, Inc. v. U S WEST, E-9-11
Ex Parte Submission

Dear Mr. Wright:

Arch Communications Group, Inc. ("Arch") hereby submits this response to the written and oral Ex Parte communications four large incumbent LECs — BellSouth, GTE, SBC, and U S WEST (collectively, "incumbent LECs") — had with you and your office last week concerning LEC/paging interconnection.[1]

Arch (which recently acquired MobileMedia Communications, Inc. and its subsidiaries), through its licensee subsidiaries, provides paging and other data messaging services in all 50 states. Arch, through its licensee subsidiaries, also provides narrowband PCS throughout the country. The issues raised by the incumbent LECs directly impact Arch. Indeed, Arch has been compelled to file formal FCC complaints against two of these LECs — BellSouth (E-99-06), and U S WEST (E-99-05) — because

[1] *See* Letter from Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Christopher J. Wright, FCC General Counsel (Oct. 14, 1999) (hereinafter "Incumbent LEC Ex Parte").

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of their unwillingness to comply with FCC rules and orders that have been affirmed on appeal.

Facilities Charges: Although courts have affirmed the FCC's LEC/CMRS interconnection rules, holding that the FCC "has the authority to issue rules of special concern to the CMRS providers,"[2] the incumbent LECs remarkably assert that the FCC has no jurisdiction to entertain pending complaints asking it to enforce its own rules and orders.

The incumbent LECs first argue that Section 51.703(b) of the FCC's rules, 47 C.F.R. § 51.703(b), prohibits only LEC charges for traffic, not charges for the facilities the LECs use in delivering their traffic to a paging carrier network.[3] According to this argument, LECs may bypass the prohibition on charges to receive their traffic through the simple expedient of re-labeling their charges (*e.g.*, charges for the facilities a LEC uses in delivering its own traffic to a paging network). The simple response to this argument is that the Chief of the Common Carrier Bureau has already found "no basis" to it.[4] Moreover, the FCC in its accompanying order could not have been clearer in ruling that

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2 *Iowa Utilities Board* v. *FCC,* 120 F.3d 753, 800 n.21 (8th Cir. 1997). Notably, no LEC chose to challenge this holding as part of their Supreme Court appeal. *AT&T* v. *Iowa Utilities Board,* 119 S. Ct. 921 (1999).

3 *See* Incumbent LEC Ex Parte at 2 (Section 51.703(b) of the rules "applies to charges for traffic, not charges for facilities"). Section 51.703(b) of the rules provides: "A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). Section 51.703(b) is consistent with Section 51.709(b) quoted below, governing the allocation of costs of two-way facilities.

4 *See Metzger Letter,* 13 F.C.C.R. 184, 185 (1997). The incumbent LECs assert that it is "not clear that the Commission even considers [this letter] binding" because applications for review have been pending for nearly two years. Incumbent LEC Ex Parte at 2. The more reasonable explanation for the delay is that the FCC has determined that there is nothing in the letter warranting prompt reconsideration. What is important is that these LECs are required to comply with FCC and Bureau rulings even while reconsideration petitions are pending. *See* 47 U.S.C. § 405(a)("No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.").

facilities charges of the sort at issue here are unlawful:

> The interconnecting [paging] carrier . . . should not be required to pay the providing [LEC] carrier for one-way trunks . . . which the providing carrier owns and uses to send its own traffic to the interconnecting carrier.[5]

The incumbent LECs next argue that the prohibition against facilities charges was not self-effectuating.[6] According to these LECs, they are free to continue imposing their facilities charges on paging carriers until *they* decide in negotiations to stop charging for their facilities.[7] The incumbent LECs are wrong again. The FCC could not have been clearer in this regard:

> Carriers operating under arrangements which do not comport with the principles we have set forth above, *shall be entitled to convert such arrangements* so that each carrier is only paying for the transport of traffic it originates, *as of the effective date of this order.*[8]

The FCC's decision to make this rule self-effectuating has been confirmed by subsequent experience. For the past several years, Arch's Vice President-Telecommunications, D. Michael Doyle, has spent over half of his time attempting to negotiate new interconnection arrangements with incumbent LECs. While some major ILECs (such as Bell Atlantic) ceased imposing charges for facilities used to carry ILEC-originated traffic to paging carriers' networks soon after the adoption of the *Local Competition Order*, many incumbent LECs have been unwilling to agree voluntarily to end their facilities charges — even after the FCC's rules were affirmed on appeal.[9] The

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5 *First Local Competition Order,* 11 F.C.C.R. 15499, 16028 ¶ 1062 (1996).

6 *See* Incumbent LEC Ex Parte at 1 ("[S]ome have argued that the Commission's rules are self-effectuating.").

7 *See id.* at 2.

8 *First Local Competition Order,* 11 F.C.C.R. at 16028 ¶ 1062 (emphasis added).

9 The FCC's finding in the *Local Competition Order* that paging carriers should receive compensation for terminating ILEC-originated traffic — rather than having to pay the ILECs for the facilities used to deliver this traffic to the paging carriers' networks — was challenged before the Eighth Circuit by a group of appellants that called themselves the Mid-Sized Incumbent Local Exchange Carriers. An opposing brief was filed by a group of wireless carriers, including

(continued...)

fact is that incumbent LECs have no incentive to stop the imposition of their facilities charges but for the FCC's rule, and at least the dominant incumbent LECs have decided to ignore these rules.[10]

A related argument the incumbent LECs advance is that they may hide behind their state tariffs. Hiding behind state tariffs is a defense incumbent LECs have long used (albeit rarely with any success) in an attempt to avoid providing reasonable interconnection under the Communications Act.[11] However, in this instance, incumbent LECs' state tariff defense is not even credible.

The FCC plainly has the statutory authority to adopt binding federal rules applicable to the interconnection between paging carriers and incumbent LECs. When the FCC exercises this authority, it imposes an affirmative obligation on incumbent LECs to modify their state tariffs to comply with the carriers' federal obligations. This, in fact, is what the FCC did in 1986, and again in 1994, when it directed incumbent LECs to negotiate interconnection agreements with paging carriers and then file state tariffs embodying the terms of those agreements. The incumbent LECs, however, consistently refused to negotiate. Instead, they filed tariffs that, in significant respects, treated paging carriers like end-users, rather than interconnecting co-carriers. This left paging carriers

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(...continued)

the Personal Communications Industry Association, which were intervenors in the case. While the court did not specifically address this issue, it upheld Rule 51.703 as applied to wireless carriers.

10 These LECs have made apparent their preference for Arch to litigate these issues in the states. However, Arch, which operates in an extremely competitive market, does not have the resources or personnel to litigate the same issue in numerous states. (BellSouth alone operates in nine states; U S WEST in 14 states.) Moreover, this repetitive litigation is senseless because the issue - - application of FCC rules - - is identical. Indeed, a different incumbent LEC commenced an informal mediation with Arch before a PUC. After five months - - and after Arch incurred considerable time and expense in traveling and the preparation of numerous legal pleadings - - the PUC staff advised the parties that the PUC likely did not have jurisdiction to enforce FCC rules. It was only then that Arch filed a FCC complaint against this LEC.

11 *See, e.g., Bell System Tariff Offering of Local Distribution Facilities for Use by Other Common Carriers,* 46 F.C.C.2d 413 (1974), *aff'd sub nom., Bell Telephone of Pennsylvania* v. *FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied.,* 422 U.S. 1026 (1975).

with no practical choice but to obtain interconnection out of the tariffs that the incumbents had filed unilaterally. In light of this history, the FCC's *Local Competition Order* directed the incumbent LECs to immediately cease charging paging carriers for the facilities used to interconnect the two carriers' networks pending the adoption of negotiated or arbitrated agreements between the parties. This *Order* imposed an obligation on the incumbent LECs to immediately modify their state tariffs to eliminate charges that the FCC, acting within the scope of its authority, had outlawed.

The incumbent LECs have recognized their obligation to modify state tariffs to comply with federal obligations in a closely related context. In response to a FCC directive that Type 1 number charges be cost based,[12] BellSouth conducted a cost study and thereafter amended its state tariffs to reduce its number charges retroactive to the effective date of the FCC *Order*.[13] As BellSouth explained to the Louisiana PUC:

> With this filing we have modified our Mobile Service Provider (MSP) Interconnection charges that apply to the assignment of telephone numbers for Type 1 interconnection. Specifically, we have eliminated the non-recurring charges and have reduced recurring rates for the provisioning of telephone numbers *in order to align BellSouth's rates with directives contained in the Federal Communications Commission's First and Second Orders in CC Docket No. 96-98*.[14]

The other three incumbent LECs similarly modified their state tariffs to comply with this same FCC *Order*. This action confirms that the incumbent LECs are fully capable of adjusting their state tariffs to comply with controlling federal law — *when* they decide that they are willing to comply with federal law. These LECs have followed federal law with respect to their number charges, but they inexplicably refuse to follow federal law with respect to their facilities charges. These LECs obviously believe that they can "pick and choose" which federal law they will follow.[15]

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12 *See Second Local Competition Order*, 11 F.C.C.R. 19392, 19538 ¶ 333 (1996)("[T]he Commission has already stated that telephone companies may not impose recurring charges solely for the use of numbers.").

13 *See* Arch Complaint E-99-06, Exhibit E at 1, Exhibit L at 2 and Exhibit S.

14 *See* Arch Complaint E-99-06, Exhibit T (emphasis added).

15 Given their flagrant — and continued — disregard for FCC rules and orders, it would be entirely appropriate for the FCC to impose sanctions on the incumbent LECs.

The incumbent LECs' argument also leads to absurd results. As the FCC is aware, paging and narrowband PCS licensees are beginning to deploy two-way capabilities to their networks.[16] Under the LEC argument, if the traffic balance between a LEC and a two-way narrowband PCS carrier is 99%-to-1% in the land-to-mobile direction, the narrowband PCS carrier would pay 1% of the cost of the interconnecting facilities and the incumbent LEC would assume 99% of the cost of the facilities.[17] Yet, according to these LECs, so long as 100% of the traffic over the interconnecting facilities is land-to-mobile, the paging carrier should pay 100% of the costs of the facilities — resulting in paging carriers subsidizing the LEC's provision of its own services over its own network.

Adoption of the incumbent LEC argument would, moreover, allow the discrimination that is occurring now to continue, to the competitive advantage of the incumbent LECs. The FCC has noted that the paging industry is "highly competitive" and that it now faces competition from broadband CMRS carriers such as those affiliated with the incumbent LECs.[18] Yet, the incumbent LECs discriminate against Arch in favor of their own CMRS affiliates that compete with Arch. For example, in Arch's complaint against BellSouth, BellSouth readily admitted that with respect to its facilities charges, it was discriminating against Arch and in favor of its CMRS affiliate. *See* Attachment A attached hereto. Arch cannot be expected to compete meaningfully with incumbent LEC CMRS affiliates if it must pay LEC facilities charges, but LECs do not pay the same charges.

As the incumbent LECs note,[19] the FCC adopted its interconnection rules to "help expedite the parties' negotiations and drive voluntary LEC-CMRS interconnection agreements."[20] However, negotiations cannot work if one party is unwilling to comply

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16 *See, e.g., Fourth Annual CMRS Competition Report,* 14 F.C.C.R. 10145 (1999); *Third Annual CMRS Competition Report,* 13 F.C.C.R. 19746 (1998).

17 *See* 47 C.F.R. § 709(b) ("The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.").

18 *See, e.g., Fourth Annual CMRS Competition Report,* 14 F.C.C.R. at ¶ 10185 ("The digital technology employed by digital cellular, broadband PCS, and digital SMR providers allows two-way handsets to act as one-way pagers and advanced messaging devices.").

19 *See* Incumbent LEC Ex Parte at 1.

20 *See First Local Competition Order,* 11 F.C.C.R. at 16005 ¶ 1024.

with governing interconnection rules, or is unwilling to treat unaffiliated interconnecting carriers in the same fashion that it treats its own affiliated carriers.

Terminating Compensation: The incumbent LECs ask the FCC to reconsider its holding — affirmed on appeal — that paging carriers, like all other telecommunications carriers, are entitled to compensation for the incremental costs they incur in terminating LEC traffic.[21] None of the three arguments that the LECs advance has merit.

The incumbent LECs first argue that paging carriers "do not terminate traffic."[22] To be sure, paging carriers use a different technology than LECs; paging carriers convert a LEC's telecommunications into packets for delivery to the person being called.[23] However, it is preposterous — and directly inconsistent with established FCC precedent — for the incumbent LECs to contend that a call from an ILEC customer to a paging carrier's customer is two "completely separate" communications. The ILEC's assessment would be correct if customers placed calls to paging carriers in order to leave messages for subsequent forwarding to, or retrieval by, the paging carriers' customers. Paging carriers, however, do not provide store-and-forward or voicemail type services. Rather, paging carriers allow ILEC customers to send real-time messages directly to the

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21 *See, e.g., id.* at 15516 ¶ 34, 15997 ¶ 1008, and 16043 ¶ 1092; 47 C.F.R. § 51.703(a). An incumbent LEC's obligation to compensate CMRS providers is not new. *See* 47 U.S.C. § 20.11(b). The incumbent LECs are wrong in asserting that Arch seeks a LEC subsidy of its "service." Incumbent LEC Ex Parte at 3. Interconnecting carriers are only entitled to receive in compensation the *traffic sensitive network* costs they incur in terminating LEC traffic. They are not entitled to recovery of non-traffic sensitive costs or all the other costs (*e.g.*, marketing, billing) incurred in providing a "service."

22 Incumbent LEC Ex Parte at 3. *See generally* Section 51.701(d) of the FCC's rules ("For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.").

23 FCC rules make clear that a "switch" is not a predicate to receiving compensation, as the incumbent LECs suggest. *See* 47 C.F.R. § 51.501(d) ("switch or equivalent facility"). Besides, industry documents define paging telecommunications equipment as a "wireless switching center." *See* Bellcore, *Compatibility Information for Interconnection of a Service Provider Service and Local Exchange Carrier Network,* TR-NPL-000145, Glossary, at 5-7 (Issue 2, Dec. 1993). *See also Pacific Bell* v. *Cook Telecom,* No. A97-02-003, 1998 U.S. Dist. LEXIS 14430, at 10 (N.D. Cal., Sept. 3, 1998) ("The Court finds, therefore, that, under the regulations, switching may also include packet and message switching, which Cook's facilities perform.").

paging carrier's customer. The fact that, in order to facilitate transmission, the information may momentarily be stored at the paging terminal does not alter the fact that the transmission between the ILEC customer and the paging carrier's customer is a single, end-to-end communication that is terminated by the paging carrier.

If Arch did not terminate traffic, LEC customers would never be able to communicate with Arch customers because the latter would never receive the former's messages. As the California Commission stated in rejecting the same argument made by a SBC subsidiary, Pacific Bell:

> If, as Pacific Bell argues, Cook does no more than "disconnect" the call, then indeed extraordinary telepathic communications occur each time a paging customer receives a message on the pager which had been "disconnected" by Cook.[24]

The incumbent LECs next argue that they can avoid compensating a paging carrier for the costs they impose on a paging carrier so long as a paging carrier does not originate any traffic. The logic of this argument — a LEC's terminating compensation obligation is triggered by the type of originating services the interconnecting carrier provides to its own customers — is not apparent. Such an argument is certainly inconsistent with the statute, which states clearly that "each carrier" shall recover its costs "of calls that originate on the network facilities of the other carrier."[25] As one federal court held in rejecting the incumbent LEC argument:

> The Act requires only that the agreements be "reciprocal" in that each carrier agrees to pay the other for the benefits its receives from the other carrier when the other carrier terminates a call that originates with the first carrier. . . . Nothing in the statute's language indicates that such compensation agreements are not required if a disproportionate number of calls will originate with the facilities of one carrier or if no calls will originate with those of the other carrier.
>
> Pacific Bell receives a benefit when another carrier terminates a call that originated with Pacific Bell. . . . Absent a compensation agreement, the carrier who terminates the call receives nothing from Pacific Bell or the caller. The Act alters this situation by requiring carriers to pay compensation for calls that

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24 *Cook Telecom/Pacific Bell Reconsideration Order,* No. C97-03990CW, 1997 Cal. PUC LEXIS 922, at 3 (Cal PUC, Sept. 24, 1997).

25 47 U.S.C. § 252(d)(2)(A)(i).

> originate in their network facilities and that are terminated on the facilities of another network. In short, the Act requires the originating carrier to pay compensation for the benefit of having its calls delivered.[26]

Finally, the incumbent LECs assert that compensating paging carriers constitutes bad public policy — even though they compensate their affiliated CMRS providers and adoption of their argument would result in discrimination among carriers in the same market.[27] However, as one federal court has noted, a LEC receives a benefit when another carrier (including a paging carrier) terminates a call:

> Namely, Pacific Bell is paid by its customers for calls that originated with Pacific Bell even when another carrier delivers that call to the called party.[28]

LECs avoid certain costs (*e.g.*, additional end office switching) when other carriers (including paging providers) terminate calls originated by the LECs' customers. Thus, it is the incumbent LECs, not paging carriers, which want free service. Not only do the incumbent LECs want paging carriers to pay them to receive their traffic (in the form of facility charges), but they also want paging carriers to terminate their traffic for free.

The incumbent LECs further contend that the current regime "distorts demand" by encouraging paging carriers to order "high capacity trunks and FX-type facilities."[29] This argument is a red herring. The interconnecting facilities at issue are part of a LEC's network, and it is therefore the LEC that determines how to "size" the facilities (so long as trunk capacity meets nondiscriminatory blocking standards). If a paging carrier

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26 *Pacific Bell,* 1998 U.S. Dist. LEXIS 14430, at 18-20.

27 The FCC did hold without explanation that paging carriers do not provide local exchange service. *See Second Local Competition Order,* 11 F.C.C.R. at 19538 ¶ 333; however, as pending reconsideration petitions point out, this ruling is inconsistent with prior FCC rulings. *See also LEC Advanced Services Order,* 13 F.C.C.R. 24011, 24032-35 (1998) ("The Commission nowhere suggested that two way voice is a *necessary* component of telephone exchange service. . . . For purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services.").

28 *Pacific Bell,* 1998 U.S. Dist. LEXIS 14430, at 20.

29 Incumbent LEC Ex Parte at 3.

requests additional facilities that are not required to meet the minimum industry blocking standard (P.01), it must pay for them.[30]

The incumbent LECs do not dispute that paging carriers are telecommunications carriers under the Communications Act. As a telecommunications carrier, Arch contributes towards the universal service fund and the administration of telephone numbers and local number portability. Yet, according to the incumbent LECs, paging carriers, though saddled with the burdens of being a carrier, are entitled to none of the benefits of being a carrier. This position is consistent with neither sound public policy nor controlling law.

Arch's complaints against BellSouth and U S WEST have been pending since December 1998. Arch has other complaints that have been pending before the FCC for over a year.[31] It is time for the FCC to issue its rulings in these complaint proceedings so meaningful interconnection negotiations with these LECs can commence.[32]

Sincerely,

Patricia A. Gray
Vice President and General Counsel

cc: John E. Ingle
Frank Lamancusa
Tamara Preiss
Paula Silberthau
Donald K. Stockdale, Jr.

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30 However, the correct pricing standard for any additional facilities is the TELRIC pricing standard governing interconnection facilities, not the fully-loaded prices a LEC charges its own retail customers.

31 *See, e.g., Arch Communications (formerly, USA Mobile)* v. *CenturyTel of Ohio,* E-98-38 (filed May 1, 1998).

32 47 U.S.C. § 208(b)(1) (requiring the FCC to decide complaints "within five months after the date on which the complaint was filed").

Arch Communications Group, Inc.
Ex Parte Submission
CC Dockets 96-98 and 95-185

ATTACHMENT A

In its answer to Arch's complaint, BellSouth readily admitted that it discriminated against Arch by imposing facilities charges on Arch but not other CMRS providers — including its own affiliated CMRS provider that provides services that compete with the services that Arch provides:

Arch Complaint at ¶ 3:	BellSouth Answer at ¶ 23:
"BellSouth has historically charged Arch for the facilities it uses in transporting its customers' local traffic to Arch's network for destination to Arch customers. These BellSouth 'facility charges' have included both recurring and non-recurring fees."	"BellSouth admits the allegations in paragraph 3 of the Complaint."
Arch Complaint at ¶ 27:	BellSouth Answer at ¶ 27:
"BellSouth does not charge broadband CMRS providers for its costs in delivering its traffic (including paging traffic) to the broadband CMRS provider's network."	"BellSouth further admits that it does not charge broadband CMRS providers for traffic in those situations."
Arch Complaint at ¶ 28:	BellSouth Answer at ¶ 28:
"BellSouth's North Carolina interconnection contract with its affiliate, BellSouth Mobility DCS, provides that the two carriers will establish separate one-way trunk groups between their two networks. Notably, BellSouth does *not* charge BellSouth Mobility for the interconnecting trunks BellSouth uses in delivering its traffic to BellSouth Mobility" (emphasis in original).	"Admitted."